

performance. Therefore, Dr. Kanen concluded that the petitioner was psychologically suited for a Police Officer position. The parties were provided with Dr. Kanen's Report and Recommendation. No exceptions or cross exceptions were filed by the parties. After a review of the record in its entirety, the Commission adopted the findings and conclusions as contained in Dr. Kanen's Report and Recommendation and ordered that the petitioner be restored to the subject eligible list and granted him a retroactive date of appointment upon successful completion of his working test period absent any disqualification issue ascertained through an updated background check. The Commission noted that any potential behavioral or work performance issues could be addressed during the petitioner's working test period as a Police Officer. *In the Matter of O.C.* (CSC, decided February 26, 2020).

In the instant matter, the petitioner requests an investigatory hearing or other review necessary to compel the appointing authority to comply with Commission's February 26, 2020 final decision. He outlines the procedural history of his case and emphasizes that the appointing authority did not appeal the Commission's final decision. Additionally, he indicates that the next class for the Union County Police Academy after the Commission's decision commenced in August 2020.² In July 2020, representatives of the Elizabeth Police Department scheduled the petitioner for a medical examination, drug test, and pre-appointment interview. The interview was cancelled, and instead, the petitioner was advised that he was to be examined by another psychologist on August 6, 2020.³ This examination was eventually postponed.⁴ It is noted that the petitioner's attorney contacted the Commission's Medical Review Panel Liaison on July 29, 2020, to discuss the issue. In response, the parties were advised that "an updated background check does not include another pre-appointment psychological evaluation if the [Commission] has found a candidate to be psychologically suited for a position upon the candidate's appeal. A recent psychological examination may only be considered part of an updated background check if either: (1) the eligible had not previously been subject to such an examination, or (2) based on information obtained during the updated background check regarding events that occurred between the original certification and the updated background check, an appointing authority has a legitimate concern that intervening circumstances require that the eligible undergo an updated psychological evaluation to ensure such fitness." Moreover, the petitioner states that, per the appointing authority's request, he submitted additional documents, such as his income tax returns and employment records from the Elizabeth Public Schools where he is employed as a security guard. On September 24, 2020, the petitioner indicates that his attorney received correspondence from the appointing authority's attorney that

² It appears from the record that the class instruction was temporarily suspended due to the COVID-19 pandemic.

³ It is noted that Dr. Betty C. McLendon performed the initial pre-appointment psychological evaluation on behalf of the appointing authority.

⁴ On August 4, 2020, the petitioner filed a Verified Complaint in Lieu of Prerogative Writ against the appointing authority. However, the Superior Court of New Jersey, Union County, denied the requested relief on September 10, 2020.

the petitioner was required to be examined by the appointing authority's psychologist. Therefore, given the foregoing, the petitioner submits that he has filed the instant request for enforcement as the appointing authority has willfully delayed in complying with the Commission's decision. In support of his request, the petitioner presents his certification and various documents with regard to this matter.

In response, the appointing authority, represented by Daniel M. Santarsiero, Esq., maintains that it did not wish to appeal the Commission's determination. Rather, its actions relate to the updated background investigation of the petitioner as noted in the Commission's decision. It explains that it had discovered that the petitioner "has either intentionally omitted certain negative background information at various points to obtain employment or has had difficulty in completing applications on account of certain deficiencies cited in the previous medical reports." It notes that, due to the COVID-19 pandemic, it was not until June 2020 when it received approval to send appointees to the Union County Police Academy, and in July 2020, the appointing authority contacted individuals who had received conditional offers of appointment. Updated background checks were performed.

The appointing authority states that, during that time, it reviewed the petitioner's personnel file with the Elizabeth Public Schools and found that the petitioner did not disclose his arrests and convictions, despite acknowledging with his signature on August 24, 2011 that "all certificate holders shall report their arrest or indictment for any crime or offense to their superintendent within 14 calendar days." Moreover, the appointing authority asserts additional inconsistencies were observed regarding the petitioner's criminal history in his 2016 and 2018 employment applications. The petitioner had applied twice to the Elizabeth Police Department. Specifically, the appointing authority argues that "O.C.'s submissions to the City contained a 2016 application that accurately described his prior arrests and convictions. Yet, the same question in Section 3 in the 2018 police department application prompted a different response in 2018. O.C. did not disclose his DUI arrest and conviction in Section 3 in 2018 and did not list motor vehicle citations. (Confidential Document #Elizabeth000018) The differences between the 2016 and 2018 applications caused the City concern over whether O.C. intended to be deceptive in his responses or, alternatively, had difficulty in providing responses due to a deficiency. As a means to obtain professional assistance in determining next steps, the City collaborated with Dr. Richard Cevasco for assistance." Dr. Cevasco recommended additional testing on the petitioner to ascertain whether "some dysfunction could have interfered with O.C.'s ability to provide accurate information in [his] applications." Thus, the appointing authority maintains that the additional testing sought was part of the updated background check that the Commission ordered and would assist the appointing authority in its interview of the petitioner, which has not yet occurred. The appointing authority emphasizes that the Commission had directed that an updated background check which yields any disqualification issue after a conditional offer of employment would be grounds to

remove the petitioner. Moreover, the appointing authority conveys that Dr. Cevalco found certain parts of Dr. Kanen's report problematic because there was "significant scatter on the subtests" which was not addressed. Dr. Cevalco also indicated that the petitioner's tests suggested "unbalanced intellectual abilities" and he needed to conduct his own testing on the petitioner. Accordingly, the appointing authority asks the Commission to deny the petitioner's request and direct that he undergo further testing with Dr. Cevalco and appear for an interview with the appointing authority. In support of its position, it submits documents obtained from the Elizabeth Public Schools; sections of the petitioner's 2016 and 2018 employment application; documentation concerning the petitioner's criminal, academic, and driving history; a certification from the Police Director, City of Elizabeth; and Dr. Cevalco's certification.

It is noted that, in its submission, the appointing authority presents the petitioner's Application for Employment for the Elizabeth Public Schools, dated 2011, which asked applicants whether they had "ever been convicted of a crime or disorderly persons offense . . . which had not been expunged or sealed by a court." The petitioner answered "No." The documents also included a disposition of the petitioner's 2008 marijuana possession charge that was dismissed on March 5, 2010. Regarding the 2016 and 2018 employment applications, in the section Legal/Criminal History Information on both applications, a series of questions were posed. The introductory paragraph asked candidates if they had "ever been arrested, indicted, charged with or convicted of a criminal offense." This question did "not apply for motor vehicle/traffic/parking tickets or summonses which will be listed in another section." If the answer to the main question was yes, applicants were directed to list all past and pending "criminal/civil charges in this state or any other jurisdiction." In his 2016 application, the petitioner listed his 2008 marijuana charges and 2013 DUI charges. In his 2018 application to the same question, the petitioner listed only his 2008 charges and not his 2013 DUI charges. The questions that followed in both applications asked about alcohol related violations, where the petitioner answered "Yes" to the questions. The documents submitted for the 2018 application also included explanations for these questions, where the petitioner specifically disclosed his 2013 arrest for DUI.

In reply, the petitioner emphasizes that his psychological suitability has been "fully litigated and determined," as well as his remote behavioral issues concerning his marijuana arrest, DUI conviction, academic history, and intelligence. He contends that the appointing authority should not be allowed "to revisit" his psychological suitability "since nothing new has occurred which would permit another test." The petitioner argues that the two instances where a psychological examination may be warranted are not present in his case. He underscores that the appointing authority's claim to have him re-evaluated is based on Dr. Cevalco's "disagreement" with Dr. Kanen's conclusions. The petitioner submits that Dr. Cevalco's opinion is "of no moment" and must be disregarded. In addition, the

petitioner notes that in the original proceeding, he submitted four letters of recommendation, attesting to his character. He states that these letters are from retired Elizabeth Police Officers, who opined that he is “an excellent security guard and shall be a fine police officer.” Moreover, the petitioner reiterates his arguments that the appointing authority delayed his processing and inappropriately scheduled the psychological appointment with Dr. Cevasco on August 6, 2020 and rescheduled the appointment, despite acknowledging the circumstances in which another test could be given.

Regarding the documentation from the Elizabeth Public Schools, the petitioner states that he accurately answered that he was never convicted of a crime or disorderly persons offense. In his 2016 employment application for an Elizabeth Police Officer position, he truthfully indicated that he had a criminal history and listed both his criminal arrest in 2008 and his traffic arrest in 2013, noting that the charges were dismissed with the exception of the DUI charge to which he pled guilty. Furthermore, the petitioner explains because he received a conditional discharge, he was not convicted of any offense in 2008. Therefore, the petitioner concludes that the appointing authority did not timely conduct his updated background investigation and permitted 14 other candidates behind him to proceed and be tested for COVID-19 in order to enter the police academy in violation of the Commission’s decision. Accordingly, in addition to compelling the appointing authority to abide by the Commission’s decision, it requests that the Commission award him back pay and counsel fees for the “significant time which was required to enforce” the Commission’s decision.

CONCLUSION

N.J.A.C. 4A:10-1.1(b) states that “[n]o person or appointing authority shall fail to comply with an order of the [Commission] or the Chairperson of the Commission or designee.” *N.J.A.C.* 4A:10-2.1(a) provides that “[w]here there is evidence of a violation of or noncompliance with Title 11A, New Jersey Statutes, or Title 4A, *N.J.A.C.*, the [Commission] shall conduct an investigatory hearing or other review, as appropriate. If a violation or noncompliance is found, the Commission may: **1.** Issue an order of compliance; **2.** Assess costs, charges, and fines not to exceed \$ 10,000; **3.** Order the appointment of an eligible from an outstanding list; **4.** In State service, consolidate personnel functions; **5.** Initiate a civil action in the Superior Court; **6.** Recommend criminal prosecution; or **7.** Take other appropriate action pursuant to law or rule.”

Initially, the petitioner requests an investigatory hearing in this matter. However, requests for enforcement are generally treated as reviews of the written record. *See N.J.S.A.* 11A:2-6(b). The parties in this matter have been given ample opportunity to brief the issues in this case. Therefore, the Commission does not find that an investigatory hearing is necessary. Moreover, a hearing at the Office of

Administrative Law is granted in those limited instances where the Commission determines that a material and controlling dispute of fact exists which can only be resolved through a hearing before an Administrative Law Judge. *See N.J.A.C. 4A:2-1.1(d)*. In this case, the Commission also finds no material issue of disputed fact which would require a plenary hearing. *See Belleville v. Department of Civil Service*, 155 N.J. Super. 517 (App. Div. 1978).

In the prior matter, the Commission adopted the findings and conclusions as contained in Dr. Kanen's Report and Recommendation and ordered that the petitioner be restored to the subject eligible list and granted him a retroactive date of appointment upon successful completion of his working test period absent any disqualification issue ascertained through an updated background check. The appointing authority argues that subjecting the petitioner to another psychological evaluation will assist in determining whether the alleged inconsistencies in his employment applications may be due to a psychological impediment. The petitioner counters that he was accurate and truthful in answering questions in his applications. He also maintains that Dr. Cevasco merely disagrees with Dr. Kanen and he should not be subjected to yet another psychological evaluation. Upon review of this matter, the Commission agrees. The petitioner should not be subjected to another psychological evaluation as he has been found psychologically fit by the Commission for the position he seeks. He has already undergone an in-depth cognitive and memory assessment.

It is well settled that an updated background check does not include another psychological evaluation when a candidate has already been found by the Commission to be psychologically suited for the position. In *In the Matter of Juan C. Betancourth* (MSB, decided February 27, 2002), the Commission's predecessor, the Merit System Board (Board),⁵ articulated that a recent psychological examination can only be considered part of an updated background check if either: (1) the eligible had not previously been subject to such an examination, or (2) based on information obtained during the updated background check regarding events that occurred between the original certification and the updated background check, an appointing authority has a legitimate concern that intervening circumstances require that the eligible undergo an updated psychological evaluation to ensure such fitness. The Board further stated that a psychological evaluation would be appropriate if the appointing authority, for example, learns that the eligible during the updated background check had been through a traumatic event or some other circumstance which may have significantly affected him or her psychologically.

⁵ On June 30, 2008, Public Law 2008, Chapter 29 was signed into law and took effect, changing the Board to the Commission, abolishing the Department of Personnel and transferring its functions, powers and duties primarily to the Commission. In this decision, the former names will be used to refer to actions which took place prior to June 30, 2008.

In the present case, neither condition has been met. No event has occurred after the petitioner's original certification that would warrant another psychological evaluation. The appointing authority presents alleged issues in employment applications that could have readily been obtained and/or was available to it in its initial background check. In other words, the appointing authority had an opportunity to request the removal of the petitioner's name based on its background investigation prior to subjecting him to a psychological examination, but it did not do so. Therefore, the Commission finds that the appointing authority is precluded from administering another psychological evaluation on the petitioner or requesting his removal from the subject eligible list based on background information which was available to it prior to its preemployment psychological evaluation of the petitioner.⁶ See e.g., *In the Matter of K.W.* (CSC, decided June 20, 2018) (Commission found that an undisclosed citation for leaving bulk garbage on the curb without a tag did not rise to the level of rendering the appellant psychologically unfit to serve as a Correction Officer Recruit, particularly since the appointing authority had the opportunity to request the removal of the appellant's name from the list based on its background investigation prior to subjecting him to a psychological examination) and *In the Matter of C.C.-J.* (CSC, decided July 31, 2019) (Commission did not accept the Panel's recommendation to refer a Correctional Police Officer candidate for an independent evaluation where the appointing authority's doctor had psychological concerns about the appellant's employment history, license suspension, and domestic issues. Rather, the Commission restored the appellant's name to the list as it emphasized that the appointing authority had the opportunity to request the removal of the appellant's

⁶ *N.J.A.C.* 4A:4-4.7(a)1, in conjunction with *N.J.A.C.* 4A:4-6.1(a)6, allows the Commission to remove an eligible's name from an employment list when he or she has made a false statement of any material fact or attempted any deception or fraud in any part of the selection or appointment process. The appointing authority suggests that the petitioner may have falsified his 2018 employment application with respect to the 2013 DUI arrest and charges. However, upon review of the information presented, and based on the questioning and wording of the 2016 and 2018 employment applications, the petitioner appropriately disclosed his DUI arrest and charges. Furthermore, although the appointing authority argues that the petitioner failed to list all motor vehicle violations, it had the driver's abstract of the petitioner. The abstract presented by the appointing authority in the instant matter is dated May 2, 2018, during the time of the 2018 application. The appointing authority and its original psychologist reviewed the petitioner's motor vehicle history, and the appointing authority did not find cause to disqualify the petitioner at that time based on an alleged falsification claim. Moreover, with regard to the Elizabeth Public School application, it is evident that the petitioner did not falsely answer the conviction question in 2011 as he was never convicted of the 2008 marijuana charge. It was dismissed by conditional discharge in 2010. However, as for whether the petitioner was obligated to advise the school district of his 2008 violation, nonetheless, and his 2013 DUI arrest and charges, and whether he did, the background information at this point is lacking. Apart from review of his personnel record with the school district, the appointing authority has not presented official confirmation from the Elizabeth Public Schools. The petitioner has also not provided a clear answer. Therefore, the Commission declines to make a finding at this juncture. Moreover, while the Commission is cognizant of the fact that the appointing authority could have explored this issue with the petitioner prior to subjecting him to a psychological evaluation, the seriousness of a possible newly uncovered violation of a public school's policy and/or regulatory and statutory requirements for failure to disclose required information cannot be overstated. As explained below, the appointing authority is not precluded from interviewing the petitioner which may lead to uncover such updated information.

name from the list based on its background investigation prior to subjecting her to a psychological examination). *Compare, In the Matter of Jean R. Bruno* (MSB, decided January 30, 2008) (Although the appellant was deemed psychologically fit and received a mandated appointment, his updated background check revealed a recent disorderly conduct offense, driver's license suspensions and falsification charges that warranted non-appointment and removal from the list).

However, the Commission does not find that the appointing authority is precluded from interviewing the petitioner as part of the updated background investigation so long as it is not an interview for psychological or psychiatric reasons. If the interview complies with Civil Service law and rules and it is not a pretext to disqualify the petitioner, an interview may reveal new information that may warrant the petitioner's removal from the subject eligible list. Nonetheless, the appointing authority must take heed that while a poor interview may establish reasons to bypass an eligible, it would not necessarily remove a candidate, especially in the petitioner's case since he was subjected to a psychological evaluation. *In the Matter of Edison Cerezo*, Docket No. A-4533-02T3 (App. Div. October 15, 2004) (Appellate Division affirmed the decision denying appointing authority's request to remove an eligible from the Police Officer eligible list due to unsatisfactory background when eligible was subjected to a psychological examination and eligible could not be bypassed).⁷ Therefore, upon conclusion of the interview and any necessary investigatory follow-up, absent any disqualification issue, the Commission reiterates that the petitioner's appointment is otherwise mandated. The Commission is mindful that the Americans with Disabilities Act (ADA), 42 U.S.C.A. §12112(d)(3), expressly requires that a job offer be made before any individual is required to submit to a medical or psychological examination. *See also* the Equal Employment Opportunity Commission's *ADA Enforcement Guidelines: Preemployment Disability Related Questions and Medical Examination* (October 10, 1995). In this case, the petitioner has already submitted to three evaluations in addition to the Panel's review of his case. Thus, as previously ordered, upon successful completion of his working test period, the petitioner is entitled to a retroactive date of appointment to July 12, 2018, the date he would have been appointed if his name had not been removed from the subject eligible list. This date is for salary step placement and seniority-based purposes only. It is noted that the petitioner was removed from the March 14, 2018 certification (OL180232) of the Police Officer (S9999U), City of Elizabeth, eligible list. Therefore, the appointing authority must conclude the petitioner's pre-appointment processing and submit the amended disposition of the petitioner's certification (OL180232) within 30 days of the issuance date of this determination. Should the petitioner be appointed, he must be offered a position in the next academy class.

⁷ The Board indicated that the appointing authority, in its discretion, could have considered Cerezo's interview as a basis to bypass his name on the subject eligible list pursuant to the "Rule of Three," *N.J.A.C. 4A:4-4.8(a)3*. However, in subjecting Cerezo to a psychological examination, which he passed and absent disqualification issues, Cerezo's appointment was mandated. *See In the Matter of Edison Cerezo* (MSB, decided March 13, 2003).

Regarding the petitioner's request for back pay and counsel fees, it is noted that the petitioner has not worked in the position nor was he disciplined in order for him to awarded back pay pursuant to *N.J.A.C.* 4A:2-2.10, which provides for back pay when a disciplinary penalty has been reversed. Similarly, with respect to counsel fees, *N.J.A.C.* 4A:2-2.12(a) provides that the Commission shall award partial or full reasonable counsel fees incurred in proceedings before it and incurred in major disciplinary proceedings at the departmental level where an employee has prevailed on all or substantially all of the primary issues before the Commission. *See also*, *N.J.S.A.* 11A:2-22. Again, this is not a disciplinary appeal. The only regulation under which the petitioner may be entitled to back pay and counsel fees is *N.J.A.C.* 4A:2-1.5(b). That regulation provides in pertinent part that:

[b]ack pay, benefits and counsel fees may be awarded in disciplinary appeals and where a layoff action has been in bad faith. *See N.J.A.C.* 4A:2-2.10. In all other appeals, such relief may be granted where the appointing authority has unreasonably failed or delayed to carry out an order of the [Commission] or where the Commission finds sufficient cause based on the particular case. A finding of sufficient cause may be made where the employee demonstrates that the appointing authority took adverse action against the employee in bad faith or with invidious motivation.

The instant matter is also not a layoff appeal. The petitioner, however, asserts that the appointing authority has willfully delayed in carrying out the Commission's prior order. Upon its review, the Commission is satisfied with the appointing authority's explanation of the the timeline of events in its efforts to process the petitioner for employment. The COVID-19 pandemic has resulted in uncertainties with employment. Further, the record does not demonstrate that the appointing authority abused its discretion, acted in bad faith, or had an invidious reason to request additional information from the petitioner. Rather, it is apparent that it had a misunderstanding of what an updated background check should or should not include and a mistaken belief that the circumstances called for another psychological evaluation, which in part was due to the recommendation of its psychologist. Therefore, under these circumstances, there is no basis to grant the petitioner's request for back pay or counsel fees.

Nonetheless, the appointing authority is reminded that the Commission is specifically given the power to assess compliance costs and fines against an appointing authority, including all administrative costs and charges, as well as fines of not more than \$10,000, for noncompliance or violation of Civil Service law or rules or any order of the Commission. *See N.J.S.A.* 11A:10-3, *N.J.A.C.* 4A:10-2.1(a)2, and *In the Matter of Fiscal Analyst (M1351H), Newark*, Docket No. A-4347-87T3 (App. Div. February 2, 1989). In the instant matter, should the appointing authority fail to

properly dispose of the subject certification within the given time, without an approved extension of time, it shall be assessed a fine in the amount of \$100 per day, beginning on the 31st day from the issuance date of this decision, and continuing for each day of continued violation, up to a maximum of \$10,000.

ORDER

Therefore, it is ordered that the petitioner's request for enforcement be granted in part in accordance with this decision.

It is further ordered that the appointing authority properly dispose of the March 14, 2018 certification (OL180232) of the Police Officer (S9999U), City of Elizabeth, eligible list as set forth above within 30 days of the issuance date of this decision. Absent any disqualification issue of the petitioner, the subject eligible list shall be revived and the petitioner's mandated appointment shall be recorded. The Commission orders that the petitioner be granted a retroactive date of appointment to July 12, 2018, for salary step placement and seniority-based purposes, upon the successful completion of his working test period.

If the appointing authority does not adhere to the above-noted timeframe for the proper certification disposition without an approved extension of time, it shall be assessed a fine in the amount of \$100 per day, beginning on the 31st day from the issuance date of this decision, and continuing for each day of continued violation, up to a maximum of \$10,000.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 3RD DAY OF FEBRUARY 2021

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